

IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-112

JAMES E. GROPP, *Petitioner,*

—v.—

JACK LESLIE, Sheriff of Dane County,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

**BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION,
AMICUS CURIAE**

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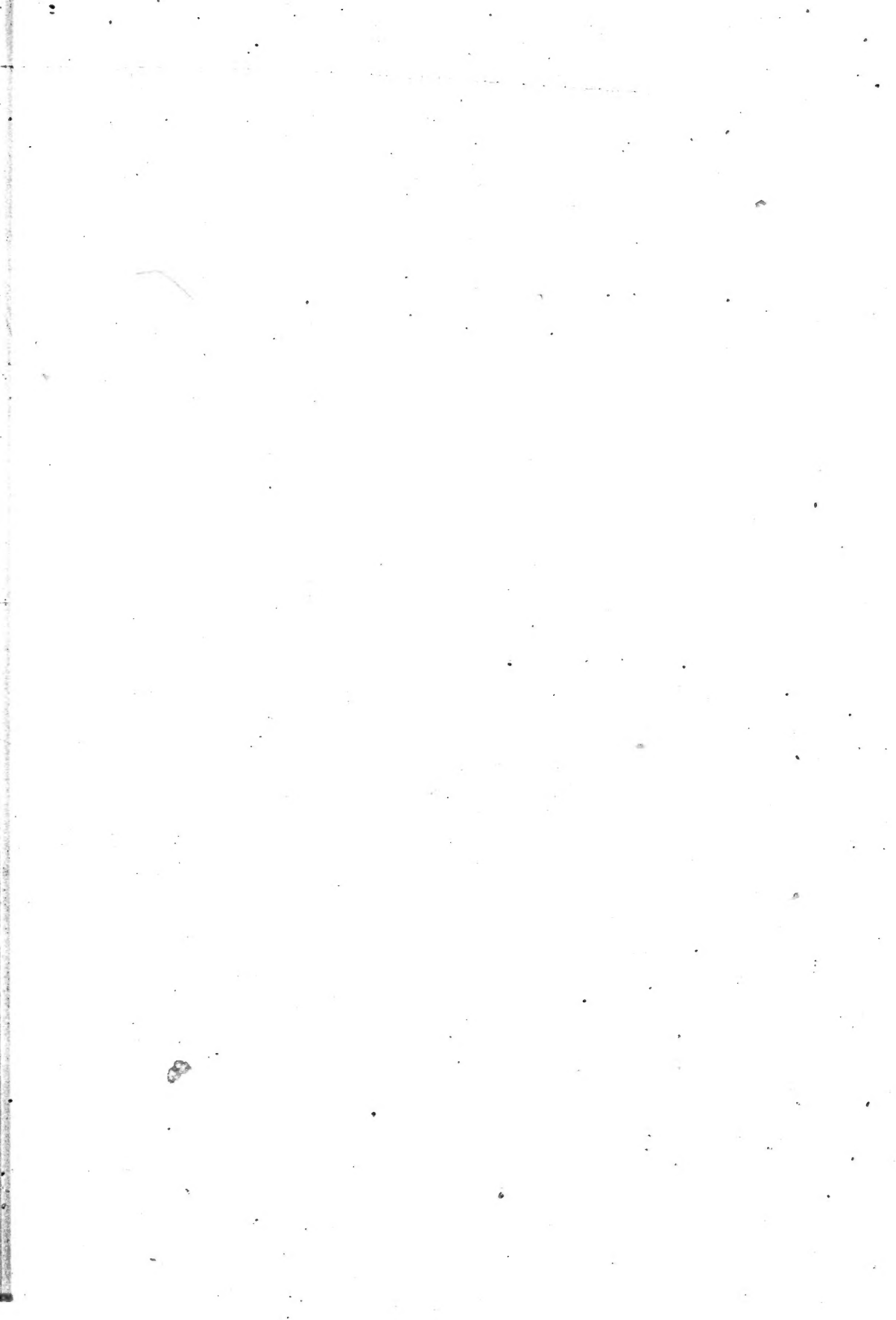
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Interest of Amicus*

The American Civil Liberties Union is a nationwide non-partisan organization of over 160,000 members dedicated exclusively to defense of those principles embodied in the Bill of Rights.

The ACLU has long been concerned with the delineation of the proper scope of legislative power with regard to the liberties of the individual. Accordingly we have participated in many of the cases before this Court where such

* Letters of consent to the filing of this brief from counsel for the petitioner and respondent have been filed with the Clerk of the Court.

issues of legislative authority have been considered. *E.g.*, *Bond v. Floyd*, 385 U.S. 116 (1966).

We believe that this case represents a particularly egregious example of legislative overreaching. If the conduct of the Wisconsin Assembly is sustained, a new era of legislative "privileges"—of the kind which were so abused in England—may be ushered in.

Statement of the Case

On October 1, 1969 the Wisconsin State Assembly passed a resolution citing the petitioner for "contempt of the Assembly" and causing his incarceration. The citation arose out of an incident two days earlier when the petitioner allegedly, in the language of the resolution, "led a gathering of people . . . which by its presence on the floor of the Assembly . . . prevented the Assembly from conducting public business and performing its constitutional duty." Based on this recitation, the resolution concluded that petitioner's actions constituted "disorderly conduct in the immediate view of the House and directly tending to interrupt its proceedings," made punishable under Wisconsin law by summary contempt.

Petitioner's efforts to secure release in the State courts were unavailing and he commenced the instant federal habeas corpus proceeding.

ARGUMENT

Introduction

The decision below upholds an unprecedented method of imposing a sentence of legislative contempt. Accordingly, the Court must consider the history of legislative contempt in order to assess the validity of the practice employed in this case.

Legislative contempt has its antecedents in Parliament's early struggles to establish parity with the Crown. But in the century preceding the American Revolution, the doctrine of Parliamentary privileges, enforced by the imposition of contempt sentences, was greatly abused primarily in order to inhibit criticism by the press. This history was well known to the Founding Fathers, and the majority of new States withheld such powers from their legislatures.

Since then, the power of the legislature to hold individuals in contempt has been greatly circumscribed. It is questionable whether a legislature by itself can ever incarcerate an individual for contempt. But even assuming it can, procedural fairness must be required as a guarantee against abusive practices. See *Watkins v. United States*, 354 U.S. 178 (1957). Especially where, as here, the events which gave rise to the citation have receded into the past, there is no reason for denying procedural due process to the alleged contemnor. See *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971).

1. The history of legislative contempt.

The history of legislative contempt in England and America is a stormy one that reflects the abuses which often accompany the exercise of the power. See *Watkins v. United States*, 354 U.S. 178, 187-192 (1957); Potts, *Power of Legislative Bodies to Punish for Contempt*, 74 U. of Pa. L. Rev. 691, 700-714 (1926) (hereinafter, *Legislative Contempt*). While legislatures in this country have generally not acquired the same broad powers to punish for contempt as was exercised in the past by both Houses of the English Parliament, see *Kilbourn v. Thompson*, 103 U.S. 168, 183-189 (1881), it is widely recognized that the idea of legislative contempt comes to us from the pages of English history and that legislatures in this country that exercise the power to punish for contempt are following the example of the English Parliament. *Watkins v. United States*, *supra* at 188; Goldfarb, *The Contempt Power*, 1-3 (1963).

The power of Parliament to punish non-members for contempt can best be understood in the context of the struggle of the House of Commons and, to a lesser extent, of the House of Lords to gain recognition for their ancient privileges. The contempt power was the principal means to give effect to the privileges claimed; and both Houses chiefly used the contempt power to punish persons for breach of privilege. Potts, *Legislative Contempt*, *supra* at 692. Among the privileges claimed by Parliament on behalf of its members were the freedoms of speech and debate and the freedom from arrest or other molestation during or on the way to a session. In addition to enforcing privileges

applicable to individual members, each House also punished as a breach of privilege anything affecting the honor and dignity of the House. Wittke, *The History of English Parliamentary Privilege*, 49 (1921) (hereinafter, *Parliamentary Privilege*). Disobedience of the order of the House was also treated as a breach of privilege subject to punishment for contempt. Maitland, *Constitutional History of England*, 377-380 (1908).

Parliament's insistence, on the whole successful, that Tudor and Stuart monarchs recognize its privileges no doubt contributed significantly to the development of Parliamentary supremacy and representative government in England. Parliament could not govern the country unless its members could speak freely on matters of state. *Strode's case* in 1512 and *Elliot's case* in 1629 reveal that the purpose of the privilege of free speech and debate was to protect Parliament members from intimidation by the monarch and accountability before a possibly hostile judiciary. The privilege thus protected the independence of the legislature. *United States v. Johnson*, 383 U.S. 169, 179, 181-82 (1966). Likewise Parliament found it necessary to treat as a breach of privilege arrests and other molestations, from whatever sources they might come, that hindered members from being actually present in Parliament and from participating in the legislative function, Wittke, *Parliamentary Privilege*, *supra* at 15-16.

But another, darker side of Parliamentary privileges appeared in the seventeenth and eighteenth centuries once Parliament began to prevail in the struggle for supremacy. Abuses of the legislative power became commonplace. Both Houses

"made such addition to their privileges, and invented so many new ones, that the subject was often the victim of a Parliamentary Tyranny which deprived him of even his ordinary common law remedies and guarantees. During the reign of George I and George II, many cases that were nothing more than trespasses upon a member's estate, and in no way affect his person, were declared breaches of privilege, and were punished by a Parliament house as such. . . . By considering such offenses as breaches of privilege, they were *ipso facto* removed to a new court and a new jurisdiction for trial—to a court and jurisdiction where many of the ordinary safeguards of the subject's liberty did not apply." Wittke, *Parliamentary Privilege*, *supra*, at 17.

The House of Commons punished as contempt everything from cutting down trees on a member's estate to the obstruction of a street leading to Parliament. *Id.* at 38, 45.

Even more dangerous to the liberty of the subject was the expansive interpretation given by Parliament to its power to punish breaches of privilege affecting the honor and dignity of Parliament. During the religious and political upheavals of the seventeenth century critical commentary of all kinds was treated as contempt of Parliament. See *Watkins v. United States*, *supra* at 189. Perhaps the most outrageous case arose from the private conversation of one Floyd, a Catholic, in which he expressed pleasure

"over the misfortune of the King's Protestant son-in-law and his wife. Floyd was not a member of Parliament. None of the persons concerned was in any way

connected with the House of Commons. Nevertheless, that body imposed an humiliating and cruel sentence upon Floyd for contempt. The House of Lords intervened, rebuking the Commons for their extension of the privilege. The Commons acceded and transferred the record of the case to the Lords, who imposed substantially the same penalty." *Id.* at 189-190 (footnotes omitted).

Throughout the eighteenth century still further abuses of the legislative contempt power continued. The Whig oligarchy that came into power after the Glorious Revolution were masters of the art of inventing fictitious claims of privilege. Wittke, *Parliamentary Privilege*, *supra* at 15.

Parliament's exercise of the contempt power was particularly instrumental in stifling public discussion and preventing the development of a free press:

Both Houses of Parliament claimed the authority to summon, interrogate, and punish individuals who were charged with the dissemination of writings, which by various devices of logic were considered to be breaches of the privilege of Parliament. The exercise of such powers was not, as we have seen, uncommon in the seventeenth century and was carried on throughout most of the eighteenth century by both Houses. The restrictions by Parliament extended to almost as wide a range of published materials as was covered by seditious libel and were, it would appear, more expeditiously enforced than the common-law rules. Siebert, *Freedom of the Press in England 1476-1776: The Rise and Decline of Government Control* 368 (1965 edition) (footnotes omitted) (hereinafter, *Freedom of the Press*).

At least four categories of writings were considered by Parliament to be breaches of privilege and therefore punishable by the respective Houses: (1) publications that libelled an individual member; (2) publications that affected the dignity of a House or of Parliament in general; (3) reflections on the government including aspersions on the King and his ministers; and (4) certain types of obscenity and blasphemy. In addition, Parliament kept its deliberations secret by punishing as contempt the publication of any report of its debates. Siebert, *Freedom of the Press*, *supra* at 369. Professor Siebert offers the following description of Parliament's efforts to enforce its own variety of the law of seditious libel:

By far the largest number of prosecutions by the House of Commons for published criticisms of the government were directed against nonmembers, principally newspaper publishers. Early in the century the House adopted the time-honored as well as time-consuming procedure of appointing a committee to investigate libels on the government. The publishers of the *Evening Post* (E. Barrington) and of the *Weekly Journal* (Mist) were turned up by one of these committees and after several delays were imprisoned and finally discharged after paying fees. In 1740 the publisher of the *Daily Post*, John Meres (Meere), suffered the same penalty. Where neither the author nor the publisher of a libelous pamphlet could be ferreted out, the paper was burned by the common hangman in public display, a practice inherited from the previous century and continued until the time of the American Revolution. Punishment by the Commons was limited to imprisonment during the session of Parliament and

payment of customary fees, whereas the Lords could theoretically imprison an offender indefinitely as well as fine him a substantial sum. By 1770 either because of the limitations on the punishment or because of a growing deference to the jurisdiction of the criminal courts, the House of Commons adopted the practice of petitioning the king to order a prosecution of the offending publishers before the common law courts. Among the last of such libels considered by the Commons during this period were the pamphlets, *The Present Crisis with Respect to America* and *Crisis No. 3*, which were voted as scandalous libels on the king and which, with the concurrence of the House of Lords, were publicly burned on 7 March 1775. Toward the end of the century Parliament became engrossed in its legislative functions and, without resistance or publicity, quietly abdicated its functions as a prosecutor and judge of seditious libels in favor of the attorney general and common-law courts. So quietly was the transition made that little notice has been given to the active control which Parliament exercised over the press through its authority to punish for breach of privilege. Siebert, *Freedom of the Press*, *supra* at 373-374 (footnotes omitted).

Before finally relinquishing its power to banish libels on government, the House of Commons in 1769 expelled one of its own members, John Wilkes, for his political writings. The Wilkes episode, which attained great notoriety on both sides of the Atlantic, demonstrated "how easily a claim of privilege might be used to sanction the arbitrary proceedings of ministers and Parliament, even when a fundamental right of the subject was concerned." Wittke, *Par-*

liamentary Privilege, supra at 122 (quoted in *Watkins v. United States, supra* at 191).

Like their English counterparts, Colonial legislatures in this country also used the contempt power to punish libels on individual members and affronts to the honor and dignity of the legislature. Potts, *Legislative Contempt, supra* at 701-706. Perhaps the most famous incident occurred in New York where on the eve of the American Revolution the General Assembly imprisoned Alexander McDougal for 81 days for publishing a scandalous reflection on the dignity of the Assembly. McDougal was a prominent member of the Sons of Liberty who rose to the rank of major general during the Revolutionary War and later became a distinguished member of the State Senate of New York. O'Callaghan, *III Documentary History of New York*, 534-537; Potts, *Legislative Contempt, supra* at 705 n. 41.

The abuses of legislative power in the Wilkes and McDougal cases were well known to the founders of the federal and state governments in the United States. The federal Constitution, as well as the constitutions of nine of the original thirteen states, made no mention of the contempt power of the legislature. Potts, *Legislative Contempt, supra* at 712-718.

On the whole, and for understandable reasons, the legislature's power to punish for contempt has been received rather cautiously in this country, and legislatures used the power far more sparingly than did the House of Commons and the House of Lords. Here there has always been a separation of powers among executive, legislative and judicial branches of government, while the power of the English Parliament developed in a framework where the legis-

lature was not only supreme, but exercised judicial as well as legislative powers. See *Kilbourn v. Thompson*, 103 U.S. 168 (1881).

2. Judicial proceedings are constitutionally preferred.

Based on this history of the abuses perpetrated by English legislatures, this Court has been extremely skeptical of the claimed power of legislatures to punish for contempt. Thus, in *Kilbourn v. Thompson*, *supra*, the Court held that the House of Representatives could not derive any authority to punish a citizen for contempt or breach of privilege from the precedents and practices of the two Houses of the English Parliament or from the adjudged cases in which the English courts had upheld those practices:

An Act of Congress which proposed to judge a man guilty of a crime and inflict the punishment, would be conceded by all thinking men to be unauthorized by anything in the Constitution. 26 L. Ed. at 384.

The Court concluded that the House had exceeded its express constitutional authority by attempting to exercise the judicial power of adjudication of guilt and punishment. Having decided in *Kilbourn* that Congress had no express power to punish for contempt, this Court in *Marshall v. Gordon*, 243 U.S. 521, 542 (1917), held that although Congress enjoyed the implied authority "to prevent acts which, in and of themselves, inherently obstruct or prevent the discharge of legislative duty or the refusal to do that which there is an inherent legislative power to compel in order

that legislative functions may be performed," such implied power did not embrace the power to punish for contempt.¹

This distinction between the two kinds of interference with legislative authority, and the consequent difference in whether or not a legislative contempt power will be implied, underlies subsequent decisions of this Court. Accordingly, where the contemptuous conduct consists of a refusal to supply information, thus frustrating congressional investigations, the power to punish for contempt was implied as necessary to the legislative function. See, e.g., *McGrain v. Daugherty*, 273 U.S. 135 (1927); *Jurney v. McCracken*, 294 U.S. 125 (1935). And even as to this latter form of contempt, *Jurney* seems to be the last reported instance where the Congress attempted to impose punishment without resort to the courts. Instead, the Congress has relied on criminal prosecution, with all of the attendant due process guarantees. See *Watkins v. United States*, *supra*.

¹ The Court quoted with approval from the decision in *Kielley v. Carson*, 4 Moore P.C.C. 63, 13 Eng. Reprint, 225:

"In conformity to this principle we feel no doubt that such an Assembly has the right of protecting itself from all impediments to the due course of its proceeding. To the full extent of every measure which it may be really necessary to adopt, to secure the free exercise of their legislative functions, they are justified in acting by the principle of the common law. But the power of punishing anyone for past misconduct as a contempt of its authority, and adjudicating upon the fact of such contempt, and the measure of punishment as a judicial body, irresponsible to the party accused, whatever the real facts may be, is of a very different character, and by no means essentially necessary for the exercise of its functions by a local legislature, whether representative or not. All these functions may be well performed without this extraordinary power, and with the aid of the ordinary tribunals to investigate and punish contemptuous insults and interruptions." 243 U.S. at 540.

Thus, we submit, the existence of legislative power to impose punishment for the kind of conduct alleged here is extremely doubtful. This is particularly so in light of this Court's recent decisions in *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971) and *Johnson v. Mississippi*, 403 U.S. 212 (1971). Those cases indicate that a defendant in a judicial criminal contempt proceeding should receive a trial before a different judge. In *Mayberry*, Chief Justice Burger, in concurring, noted:

There are other means to cope with grave misconduct in the courtroom, whether that of the accused, his counsel, spectators or others. Statutes defining obstruction of justice have long been in force in many States, with penalties measured in years of confinement. Such statutes, where available, are an obvious response to those who seek to frustrate a particular trial or undermine the processes of justice generally. 27 L. Ed. 2d at 542.

Similarly, here, once the alleged contempt had been concluded, the constitutionally preferable response would have been criminal prosecution under state law.

3. The importance of procedure in cases of legislative contempt.

Because of the great potential for abuse of the legislative contempt power, procedural regularity and fairness was of vital importance in cases of legislative contempt. Both English and American history show that questions of legislative contempt were frequently treated as political questions decided along party lines. This danger was most apparent in the eighteenth century when both Parliament and Congress directly adjudicated cases of legislative

contempt and imposed punishment on the guilty individuals. Today the danger has been considerably alleviated because both Parliament and Congress refer cases of legislative contempt to the courts for prosecution and punishment. This reliance on judicial enforcement insures that fair procedures will be observed and due process of law will be afforded in adjudicating cases of legislative contempt. But even assuming that legislatures themselves have the power to impose punishment for the kind of conduct alleged here, but see point 2, *supra*, at the very least the legislature must grant a fair hearing.

Until the end of the eighteenth century each House of Parliament proceeded directly in cases of contempt by summoning the contemnor before the bar of the House and determining his guilt or innocence. All of the reported cases indicate that the alleged contemnor was given notice of the charges and at least some opportunity to be heard. Parliament did not try individuals *in absentia* but always insisted that the contemnor be personally present at the bar. To a certain extent each House in such proceedings acted according to rules of procedure; precedents were collected and often respected. But far too often questions of breach of privilege were treated along party lines. Maitland, *Constitutional History of England* 379 (1908). Such treatment lead to many excesses, and the more recent practice of the House of Commons has been to avoid such excesses of jurisdiction by directing a prosecution by the Attorney General for contempts that have been brought to its attention. Taswell-Langmead, *English Constitutional History* 587 (11th ed. 1960). The House of Commons first adopted the practice around 1770 in libel cases because the repressive use of the contempt power had aroused con-

siderable opposition. Siebert, *Freedom of the Press*, *supra* at 373.

Congress likewise rarely exercises its power to punish directly for contempt. Instead it certifies the facts constituting the contempt to the United States Attorney for the district in which the contempt occurred for prosecution and punishment in the federal courts under 2 U.S.C. Sections 192-194. Goldfarb, *The Contempt Power* 43. In former times Congress followed the old English practices of summoning the contemnor before the bar of the House and then trying and punishing him for contempt. *Journey v. McCracken*, *supra*, appears to be the last recorded instance of this practice. The dangers inherent in such a practice are apparent from the well known proceedings brought by the Senate in 1800 against William Duane. Duane, the editor of the leading Jeffersonian paper, *Aurora*, was ordered to appear before the Federalist-dominated Senate to answer the charge of publishing a libel on the Senate and one of its committees. Duane never appeared because of restrictions placed on the role of his counsel. The Senate, on a party line vote, treated his non-appearance as contempt and ordered his imprisonment. Smith, *Freedom's Fetters*, 277-306 (1956); Potts, *Legislative Contempt*, *supra* at 720-21. Thus, even with a summary hearing, abuses were perpetrated; with no procedures at all, as here, the possibilities for bad faith punishment are enormous.

The present practice of referring cases of legislative contempt for prosecution in the federal courts assures that procedural safeguards will be observed and that a partisan spirit will not determine the outcome. "By thus making the federal judiciary the affirmative agency for enforcing the

authority that underlies the Congressional power to punish for contempt, Congress necessarily brings into play the specific provisions of the Constitution relating to the prosecution of offenses and those implied restrictions under which courts function." *Watkins v. United States, supra* at 217 (Frankfurter, J., concurring). Even if the Court does not hold such a practice to be constitutionally mandated, it should at least require the legislature to afford minimum due process safeguards.

4. The legislative resolution committing the petitioner for contempt deprived him of due process of law.

In a variety of respects the action of the Wisconsin Assembly denied the petitioner due process of law. The Assembly found the petitioner guilty of contempt and sentenced him to six months in prison without providing any opportunity to be heard before the Assembly or one of its committees—let alone a court of law—on either the issue of guilt or the question of punishment. Moreover, the Assembly acted in an *ex parte*, summary manner even though two full days had transpired since the events in question. At that point, the need for summary punishment had vanished and the imposition of such punishment offends due process. *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971). Finally, the contempt resolution was so vague as to render any meaningful judicial review all but impossible. Cf., *In Re Gault*, 387 U.S. 1 (1967).

The Wisconsin legislature made no attempt to afford Groppi any notice of the charges against him or any opportunity to be heard on his own behalf. It would be anomalous to recognize the procedural rights of the targets of legisla-

tive and administrative investigations, see *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951); *Jenkins v. McKeithen*, 395 U.S. 411 (1969), but to deny altogether the rights of the criminal defendant before the legislative body. At the very least this Court should require that the legislature follow the time-honored practice of summoning the offender before the Bar and affording him an opportunity to be heard. If the legislature finds it too cumbersome to afford a contemnor this type of hearing, it can always refer the matter to the executive for prosecution in the ordinary courts of justice. In most instances this would appear to be the better course. The public, as well as the defendant himself, will have more respect for the impartial judgment of a court than for the legislature's vote on a contempt resolution. The legislature is necessarily a political body; legislators are responsible to their constituents and are not expected to exclude political considerations from their mind. If the legislature fears that the executive may decline to prosecute contempt cases, it can enact legislation patterned on 2 U.S.C. Section 194 imposing a duty on the executive to prosecute.

In addition to the lack of procedures, the vagueness and uninformativeness of the contempt resolution passed by the Wisconsin Assembly also denied Groppi of his right to due process of law. It is a fundamental rule that a summary contempt order in judicial proceedings must carry in itself a statement of the acts or words constituting the contempt. See *Ex parte Terry*, 128 U.S. 289, 305 (1888). The Seventh Circuit has applied this requirement to the quasi-judicial proceedings of administrative agencies, *Great Lakes Screw Corp. v. NLRB*, 409 F.2d 375 (1969). The California Supreme Court has also required that in cases of summary contempt the legislature must

recite in the contempt order the facts of what occurred in the immediate view and presence of the legislature. *Ex parte Battelle*, 207 Cal. 227, 277 Pac. 725, 736 (1929).*

The contempt resolution here is similarly defective because it does not recite the facts of how the gathering which the petitioner allegedly held on the Assembly floor prevented the Assembly from conducting public business and performing its constitutional duty. The resolution is conclusionary and does not inform either the petitioner or a reviewing court of the facts that constituted the alleged contempt. A person cannot defend himself against such a vague charge, nor can a reviewing court determine the validity of the commitment. See *In Re Gault*, *supra*.

In England the courts have refused to inquire into the merits when Parliament has committed an individual for contempt, thus allowing Parliament to commit for contempt without giving any reason or stating any facts. *Case of the Sheriff of Middlesex*, 11 Adolp and Ellis 273 (Q.B. 1840). In this country the practice has been different, and this Court has traditionally reviewed the merits of a conviction for legislative contempt. *Kilbourn v. Thompson*, *supra*; *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821). Indeed, even the Wisconsin Supreme Court has adopted this same practice, see *State ex rel. Groppi v. Leslie*, 44 Wis. 2d 282, 171 N.W. 2d 192 (1969). But such a review cannot pro-

* *Battelle* was a case of summary contempt because the alleged contemnor (Battelle) had been brought before the bar of the California Senate and had there refused to answer various questions. The contempt order was held invalid by the court because it did not state the precise questions which the witness refused to answer and their pertinency to the investigation. The omissions made it impossible for the court to judge the correctness of the legislature's committal of Battelle for contempt.

ceed fairly unless the legislature states the facts that constitute the contempt. In the absence of such a statement, the reviewing court was left with the improper alternative of taking Judicial Notice of what transpired on the Assembly floor on September 29, 1970. Davis, *Administrative Law Treatise*, Paragraph 15.03 (1958).

It is well settled that this Court has jurisdiction to determine whether the action of a state legislative body deprives a person of a federal constitutional right. *Bond v. Floyd*, 385 U.S. 116 (1966). This Court should hold that the Wisconsin Assembly violated petitioner's right to due process of law under the Fourteenth Amendment. The abuses which have accompanied past exercises of the legislative power to punish for contempt should lead the Court to insist that the legislature at the very least afford the procedural safeguards of notice and hearing before it punishes a person for contempt. While the legislature need not afford notice and hearing before it clears the floor of disrupters by ordering their arrest, whether by local law enforcement officials or by its own sergeant-at-arms, but it must observe those safeguards before it punishes an alleged disrupter by sentencing him to jail for six months.

CONCLUSION

**For the reasons set forth herein, the decision below
should be reversed.**

Respectfully submitted,

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